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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN TRACY BUTLER,

Defendant and Appellant.

G046282

(Super. Ct. No. 10WF1954)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Daniel J. Didier, Judge. Affirmed as modified.

James Kehoe, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, for Plaintiff and Respondent.

* * *

A jury convicted defendant John Tracy Butler of violating Penal Code sections 451, subdivision (d)¹ (arson of another's property; count 1) and 594, subdivisions (a) and (b)(1) (vandalism causing damage of \$400 or more; count 2). Defendant filed a notice of appeal, and we appointed counsel to represent him. Counsel did not argue against defendant, but advised the court he was unable to find an issue to argue on defendant's behalf. Defendant was given 30 days to file written argument in his own behalf. That period has passed, and we have not received any communication from defendant. We have examined the record and have not found an arguable issue. (*People v. Wende* (1979) 25 Cal.3d 436.) Accordingly, we affirm the judgment.

FACTS

On August 10, 2010, a 14-year-old boy, sitting about 10 feet away from a man on a bus and with a clear view of the man, saw the man look at the bus driver, then look down and do something with his hands, acting suspiciously the whole time. The man put something under the side of his seat, grabbed his bag from the floor, and left the bus at a bus stop. The man had a mustache and small beard and was wearing a khaki hat, a white shirt, khaki pants, white tennis shoes, and had a green back pack/duffle bag.

When the bus started moving again, the witness smelled smoke and saw flames and alerted the bus driver. The bus driver, who had smelled fire and saw smoke in the rear of the bus, pulled over and evacuated the bus. The driver put out the fire with an extinguisher.

An officer was dispatched to the area to look for a suspect in his thirties wearing a khaki hat and khaki pants. The officer spoke to defendant, who matched the description of the suspect and was sitting at a bus stop near the location. Defendant was

¹ All statutory references are to the Penal Code.

the only caucasian in this area of Little Saigon and the only person who matched the suspect's description. Defendant seemed calm and said he had known the officer would be back to talk with him. With defendant's consent, the officer searched him and found two Bic lighters. Defendant was wearing a khaki hat, a red and black striped long sleeve shirt over a white T-shirt, blue jeans, and black boots. Defendant had a green back pack satchel.

Defendant told various officers that he had exited the bus because it was going in the wrong direction and that he was carrying lighters because he was a smoker. When told (falsely) that a videotape taken on the bus showed him lighting a candle, defendant denied lighting anything. Defendant gave one officer his bus pass, which was for a disabled senior citizen.

A bomb squad officer found a candle wrapped in a charred bandana on the bus wedged between the wall and under a seat. Analysis revealed the bandana had not been soaked in accelerant.

Two days after the incident, at an in-field showup, the 14-year-old witness identified defendant as the man on the bus with 100 percent certainty. At trial the witness again identified defendant as the man on the bus.

The total cost to repair and clean the bus was \$1,535.

An information charged defendant with arson and vandalism. The court ordered a section 1368 hearing on defendant's competency. In December 2010, based on the reports of a psychiatrist and a psychologist, the court found defendant incompetent to stand trial, committed him to Patten State Hospital for a maximum term of three years, and authorized the facility to involuntarily administer medication to him.

In September 2011, the court found defendant to be competent and reinstated the criminal proceedings. A jury convicted defendant of both the arson and vandalism counts. The court sentenced him to the midterm of two years on count 1, with total credits of 984 days. The court stayed execution of a two-year midterm sentence on

count 2 pursuant to section 654. The court ordered defendant to pay various fines and fees, including victim restitution in the amount of \$1,535.

DISCUSSION

Initially, we observe that, due to a clerical error, a December 21, 2011 minute order reflects a \$235 booking fee that was not ordered by the court. Our independent review of the record reveals no oral pronouncement by the court of a booking fee. (*People v. Mesa* (1975) 14 Cal.3d 466, 471 [“Entering the judgment in the minutes being a clerical function [citation], a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error”].) We asked the Attorney General whether she would object to our vacating the imposition of the booking fee and she had none. We will therefore strike the \$235 booking fee.

Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel has suggested we consider two further issues in conducting our independent review of the record.

First, counsel suggests we review whether victim restitution in the amount of \$1,535 was properly awarded. Under section 1202.4, subdivisions (a) and (f), when a defendant is convicted of a crime and the victim has suffered economic loss as a result of the defendant’s conduct, the court must order the defendant to make restitution to the victim in an amount based on the amount of loss claimed by the victim or any other showing to the court. The court must “order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record.” (§ 1202.4, subd. (f).) “A defendant’s inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution order, nor shall inability to pay be a consideration in determining the amount of a restitution order.” (*Id.*, subd. (g).) To the extent possible, the restitution order must fully reimburse the victim for economic loss

incurred as the result of the defendant's criminal conduct, including payment for the replacement or repair of damaged property. (*Id.*, subd. (f)(3)(A).) The word "victim" includes any corporation, governmental agency, or any other legal or commercial entity that is a direct victim of a crime. (*Id.*, subd. (k)(2).)

At trial, an Orange County Transit Authority maintenance manager testified that the actual cost to repair the bus was \$1535. This included replacing part of a seat back and a panel and cleaning the whole bus due to the fire extinguisher powder that had drifted through the vehicle. Thus, under section 1202.4, the court's reimbursement order was mandatory and appropriate.

Second, counsel suggests we consider whether the court correctly denied defendant's six *Marsden* motions, on which hearings were respectively held on August 16 and 27, September 15, and November 8 of 2010 and October 27 and December 8 of 2011. "[T]he decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney during the trial is within the discretion of the trial court, and a defendant has no absolute right to more than one appointed attorney." (*People v. Marsden* (1970) 2 Cal.3d 118, 123.) A court is required to appoint substitute counsel only "where the record clearly shows that the first appointed counsel is not adequately representing the accused. . . ." (*Ibid.*) When a defendant moves for a substitution of court-appointed counsel, the court, in order to "thoughtfully exercise its discretion in this matter [must] listen[] to his reasons for requesting a change of attorneys. A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless [the judge] is cognizant of the grounds which prompted the request." (*Ibid.*) Thus, the court must afford the defendant an opportunity "to explain the basis of his contention[,] to relate specific instances of the attorney's inadequate performance" (*People v. Memro* (1995) 11 Cal.4th 786, 857), and to "catalogue[] acts and events beyond the observations of the trial judge to establish the incompetence of his counsel" (*Marsden*, at p. 126). A

court may not deny a *Marsden* motion solely on the basis of the court's courtroom observations. (*Id.* at p. 124.)

We have reviewed the reporter's transcripts of the six *Marsden* hearings. The *Marsden* requirements were met and the court properly stated reasons for denying the motion in each instance.

Our independent review of the record has failed to disclose any other arguable issues.

DISPOSITION

We hereby strike the \$235 booking fee reflected in a December 21, 2011 minute order. In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.